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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PAUL URQUIDEZ LOPEZ, Defendant and Appellant.	H032952 (Santa Clara County Super. Ct. No. CC753124)

A jury found defendant Paul Urquidez Lopez guilty of six criminal offenses.[1] On appeal, defendant claims ineffective assistance of counsel for failure (1) to object to testimony about the victim's reaction to a photographic line-up, and (2) to exclude or limit gang evidence. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The events at issue in this proceeding took place in December 2006. On December 26th, in two separate attacks, three men forcibly entered a San Jose

[1] All six offenses were Penal Code violations. (Unspecified statutory references are to that code.) Defendant was convicted of attempted murder (§ 664/187), two counts of burglary (§ 459/460), assault (§ 245), resisting arrest (§ 148), and giving a false name to a police officer (§ 148.9).

apartment and severely injured two men living there. One of the victims identified defendant in a photo line-up. On December 31st, defendant was arrested.

I. Fact Summary

A. The Attack on Carlos Aguilar

In December 2006, Carlos Aguilar was living in a San Jose apartment with his uncles Jose, Daniel, and Omar Menjivar, and his friend Martel Alvarez.

On the afternoon of December 26th, Carlos, Martel, and Jose were at the apartment when three men burst in. The intruders beat Carlos with their fists, bottles, and possibly chairs. The attack lasted five or six minutes. During the attack, one of the attackers was yelling, "He's my brother. He's my brother."

Jose picked up a cell phone and went to the bedroom to call the police. The assailants then fled. Police and paramedics responded. Carlos was taken to the hospital with head wounds that required staples to close.

B. The Attack on Jose Menjivar

Later in the afternoon of December 26th, about 10 minutes after the police left, the men who attacked Carlos returned. When their knocks went unanswered, they kicked the door in. Two of the assailants were wielding knives and demanding money.

The third assailant put a gun to Jose's head, accused him of calling the police, and told him he was going to die. He then shot Jose point blank in the left temple, near his jawbone. Jose was taken to the hospital, where he underwent surgery. Jose was hospitalized for eight or nine days. Jose's broken jaw was wired shut. His doctors were unable to remove the bullet.

C. Defendant's Arrest

On December 31, 2006, five days after the attacks on Carlos and Jose, police responded to a domestic disturbance call and found defendant in the street, arguing with his girlfriend. The officer asked the two to approach, but defendant turned and ran. The officer grabbed defendant, but he brushed her off and continued to run. After deploying her taser twice, the officer eventually subdued defendant by physical contact, with the assistance of another officer. Defendant gave the officer a false name.

II. Procedural History

In January 2007, a six-count complaint was filed against defendant in Santa Clara County. The complaint alleged four felonies: count 1, attempted murder of Jose Menjivar (§ 664/187); counts 2 and 3, burglary (§ 459); and count 4, assault on Carlos Aguilar (§ 245). The complaint also alleged two misdemeanors: count 5, resisting arrest (§ 148); and count 6, giving a police officer a false name (§ 148.9). As sentence enhancements, the complaint also alleged defendant's commission of prior offenses.

Following a preliminary examination in May 2007, defendant was held to answer the charges. An information was filed the following month, which contained the same charges and allegations as the complaint, with minor amendments to conform to proof at the preliminary examination. Defendant pleaded not guilty.

The charges against defendant were tried to a jury in an eight-day trial, which began in December 2007 and ended in January 2008. The principal disputed issue at trial was the identification of defendant as an assailant in the two attacks.

On January 7, 2008, the jury returned guilty verdicts on all six counts. The sentence enhancement allegations were thereafter tried to the court, defendant having waived jury trial on those allegations. Following a hearing on January 14, 2008, the court found the allegations true.

In April 2008, the court sentenced defendant to an indeterminate term totaling 39 years to life, consecutive to a determinate term of 14 years. Defendant brought this timely appeal.

ISSUES ON APPEAL

Defendant contends that he received ineffective assistance of counsel (1) because his trial attorney failed to object to improper testimony concerning Jose's reaction to defendant's line-up photograph, specifically that Jose's heart monitor "shot up" when defendant's photograph was shown, and (2) because his trial attorney failed to prevent or limit the introduction of gang evidence.

Representing respondent, the Attorney General disputes both contentions.

DISCUSSION

As a framework for assessing defendant's contentions, we first summarize the legal principles governing claims of ineffective assistance of counsel. We then apply those principles to the case before us.

I. Legal Principles

A. Elements of the Claim

"There are two components to an ineffective assistance of counsel claim: deficient performance of counsel and prejudice to the petitioner." (*In re Cox* (2003) 30 Cal.4th 974, 1019.) To prevail on the claim, the defendant must show

both elements. (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93; *In re Resendiz* (2001) 25 Cal.4th 230, 239.)

"The first prong, deficient performance, is established if the record demonstrates that counsel's performance fell below an objective standard of reasonableness under the prevailing norms of practice." (*In re Alvernaz* (1992) 2 Cal.4th 924, 937; *People v. Benavides, supra*, 35 Cal.4th at p. 93.) In assessing performance, courts must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) "On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007; *People v. Hart* (1999) 20 Cal.4th 546, 623-624.) Case law recognizes that "counsel's omission legitimately may have been based in part on considerations that do not appear on the record, including confidential communications from the client." (*People v. Lucas* (1995) 12 Cal.4th 415, 443.)

The second prong, prejudice, requires proof of a reasonable probability that the result would have been different in the absence of counsel's incompetence. (*People v. Benavides, supra*, 35 Cal.4th at p. 93.) Prejudice must be established as a demonstrable reality and not mere speculation. (*In re Cox, supra,* 30 Cal.4th at p. 1016.) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different." (*People v. Mesa, supra,* 144 Cal.App.4th at p. 1008.) A reasonable probability is one sufficient to undermine confidence in the trial's outcome. (*People v. Hart, supra,* 20 Cal.4th at p. 624.)

The two elements of the claim are independent. (*Strickland v. Washington, supra*, 466 U.S. at p. 697; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.) For that reason, we need not discuss whether counsel's performance was deficient if we discern no reasonable probability of an adverse effect on the outcome. (*In re Cox, supra*, 30 Cal.4th at pp. 1019-1020; *People v. Mesa, supra,* 144 Cal.App.4th at p. 1008.)

B. Appellate Review

A claim of ineffective assistance of counsel presents a mixed question of fact and law, which is generally subject to de novo review, especially where constitutional rights are implicated. (*In re Resendiz, supra,* 25 Cal.4th at pp. 248-249.) We independently review the record, to determine whether there is "a preponderance of substantial, credible evidence" of ineffective representation. (*In re Alvernaz, supra,* 2 Cal.4th at pp. 944-945.) The appellant has the burden of affirmatively proving both inadequacy and resulting prejudice. (*People v. Pope* (1979) 23 Cal.3d 412, 425; *People v. Hart, supra,* 20 Cal.4th at p. 624.)

II. Application

A. Heart Monitor Evidence

In his first argument on appeal, defendant complains that trial counsel was ineffective for failing to object to testimony by San Jose Police Detective Anthony Kilmer that the victim's heart monitor "shot up" upon seeing defendant's photograph.

1. Background

Detective Kilmer prepared the six-photo line-up that was shown to Jose in the intensive care unit of the hospital. As Kilmer described it, Jose "was hooked

up to different monitors and tubes and whatnot." The line-up was presented to Jose by Kilmer's fellow officer, San Jose Police Detective Cristobal Dominguez.

Without defense objection, Kilmer testified to Jose's reaction to defendant's photograph as follows: "I immediately noticed Mr. Menjivar turned white. He – his eyes welled up like he was getting ready to cry. I looked at the heart monitor, and his heart monitor just shot up. I don't know how high it was, but it just seemed to go up higher. He appeared upset, very upset."

The prosecutor mentioned Kilmer's statement about the heart monitor in her closing argument. But the prosecutor also remarked on the "lack of scientific evidence" in the case.

2. Admissibility of the Evidence

Defendant characterizes Kilmer's observation about the heart monitor as scientific evidence. As defendant acknowledges, "Kilmer's testimony could be viewed as a simple recounting of details he personally observed in Jose's hospital room." But defendant takes issue with "the *type* of detail he claimed to observe, and the undue significance that lay jurors would give to such testimony. A heart monitor is, after all, a sophisticated medical device normally read and interpreted by professional medical personnel. It plainly is not something within the common knowledge of lay persons."

As a general rule, "evidence based on a new scientific method of proof must satisfy three requirements before it may be admitted." (*People v. Diaz* (1992) 3 Cal.4th 495, 526.) Those requirements are: "(1) the relevant scientific community's general acceptance of the technique or testing procedure, (2) an expert properly qualified to testify regarding such reliability, and (3) use of correct scientific procedures in the case" at hand. (*People v. Cook* (2007) 40 Cal.4th 1334, 1344.) Defendant argues that the evidence was inadmissible for the same

reasons that polygraph evidence cannot be introduced. (See Evid. Code, § 351.1; *People v. Wilkinson* (2004) 33 Cal.4th 821, 845-846.)

3. Counsel's Performance

As noted above, courts must be "highly deferential" to the tactical decisions made by counsel. (*Strickland v. Washington, supra*, 466 U.S. at p. 689.) Deference does not mean abdication. (*In re Jones* (1996) 13 Cal.4th 552, 561-562.) But if trial counsel's omission stemmed from an informed tactical choice that a reasonably competent attorney might make, the conviction must be affirmed. (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.)

As California Supreme Court precedent teaches, " 'deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' " (*People v. Chatman* (2006) 38 Cal.4th 344, 384, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) But an exception exists where "there simply could be no satisfactory explanation" for counsel's failure to object. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Here, the record does not rule out the existence of satisfactory reasons for not objecting to the heart monitor evidence. (*People v. Carter, supra*, 30 Cal.4th at p. 1211.) As one obvious example, "counsel may have deemed it unwise to call further attention to it." (*People v. Hinton* (2006) 37 Cal.4th 839, 878 [failure to request a limiting instruction].)

4. Prejudice

In any event, even assuming error on the part of defendant's trial counsel, we discern no prejudice. We offer several reasons.

For one thing, the heart monitor evidence was insignificant in the context of this eight-day trial. It was mentioned in testimony only one time, by one witness. (Cf. *People v. Cox* (2003) 30 Cal.4th 916, 952 [prosecutor's question about polygraph, which was stricken, "was an isolated instance in an otherwise well-

conducted month-long trial in which 90 witnesses testified"]; disapproved on another point in *People v. Doolin* (2009)45 Cal.4th 390, 421, fn. 22.)

For another thing, the heart monitor evidence was presented in the context of the officer's observations, not explicitly as medical or scientific evidence. "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly* (1976) 17 Cal.3d 24, 31; *People v. Leahy* (1994) 8 Cal.4th 587, 595.) Judicial concern arises from the " 'misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature.' " (*People v. Kelly*, at p. 32; *People v. Leahy*, at p. 595.) That concern does not fit our facts, however. It seems unlikely that the jury viewed Kilmer as anything other than a lay observer, given his description of the medical equipment in Jose's hospital room as "monitors and tubes and whatnot."

Finally, contrary to defendant's contentions, the prosecution's identification evidence was strong. Four witnesses identified defendant as an assailant: Martel Alvarez and Jose Menjivar, who were at the apartment during both attacks, and Daniel and Omar Menjivar, who were present only during the attack on Jose.[2]

a. Martel's Identification

At the preliminary hearing, Martel identified defendant as the person who beat Carlos and shot Jose. As he was unavailable as a trial witness, Martel's testimony from the preliminary hearing was read to the jury.

b. Jose's Identification

Jose first identified defendant the day after the attacks, while in the intensive care unit of the hospital. Presented with a six-photo line-up, Jose positively identified defendant's photograph as the assailant who shot him and

[2] Carlos did not testify, having died less than a month after the attacks in an unrelated vehicle collision.

beat Carlos. Jose said: "This is him. [¶] . . . I know perfectly well. I cannot be mistaken."

Jose next identified defendant at the preliminary hearing in May 2007. At first, he was unable to identify defendant in court as the assailant. Jose was frightened. And defendant's appearance had changed since the time of the attacks; his hair had grown out, his mustache was gone, and he was wearing glasses. Jose thought that the attacker had teardrop tattoos on his face, though defendant has none. Jose testified: "I don't see any teardrops. Well, maybe his face was dirty that day, I don't know, but I would not mistake him at all. This is the same man, the same mustache, his eyes, his face, I wouldn't mistake him, his neck." After being shown defendant's neck tattoos in court, Jose was asked: "Is this not the same man that shot you?" He replied: "It seems to me, yes. He doesn't have the mustache though."

At trial, Jose testified that he was certain that defendant was the man who shot him and beat his nephew. Jose confirmed that he had "always said that the person in the photo" – defendant – was the one who shot him. Jose was asked "are you 100 percent positive that the person in the photo is the person who shot you?" He responded: "That's right."

c. Daniel's Identification

At the preliminary examination, Daniel identified defendant as the attacker. Concerning defendant's neck tattoos, Daniel could not say "exactly what the tattoos said," but he testified that they were "completely similar" in location to the shooter's tattoos. At trial, Daniel testified that he got "a good look" at the person who shot his brother Jose.[3] He stated that the shooter "had a tattoo on his

[3] There were discrepancies in the evidence concerning Daniel's location during the attack on Jose. According to testimony by the officer who interviewed him at the scene, Daniel stated that he was knocking on the neighbor's door when

neck." Daniel made an in-court identification of defendant, saying that he was "a hundred percent sure" that defendant was the man who shot Jose. He recognized defendant from his neck tattoos alone.

d. Omar's Identification

Omar did not testify at the preliminary hearing. At trial, Omar recognized defendant from the tattoos on his neck. Based on the photograph of defendant taken at the time of his arrest, Omar positively identified him as the attacker.

Given the strength of the prosecution case, and the negligible role of the heart monitor evidence in the context of the case as a whole, it is not reasonably probable that the outcome of the trial would have been different had counsel successfully objected to Kilmer's statement.

B. Gang Evidence

In his other appellate argument, defendant complains that his trial counsel was ineffective for failing to prevent or limit the introduction of gang evidence. Defendant was not charged with any substantive gang offense or enhancement. The gang evidence came in through testimony by San Jose Police Detective Kilmer and through recordings of defendant's jail calls.

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he heard the gunshot; he never mentioned being inside the apartment during the attack. Both at the preliminary hearing and at trial, however, Daniel testified that he was in the living room during the attacks. At the preliminary hearing, Daniel acknowledged that he was confused right after the event and may have misspoken during the police interview. At trial, Daniel testified that he never told the officer that he had been at the neighbor's when Jose was shot, but there might have been "a confusion among the policemen." Omar testified that Daniel was in the living room with Jose prior to the attack.

1. Background

a. Kilmer's Testimony

Detective Kilmer was assigned to the San Jose Police Department's gang investigations unit. The court qualified him as an expert on Sureño and Norteño street gang activity in San Jose.

Kilmer began by giving the jury general information about Sureño and Norteño gangs. He testified that "a lot of gang members" – both Sureño and Norteño – have shaved heads and tattoos on their necks. Kilmer described Sureño gangs as associating "with the color blue, the number 13 or variations of the 13: The one, the three, three dots, etc." He described Norteño gangs as associating "with the color red, number 14 or variations of the number 14: the one, the four, four dots, etc." Kilmer stated that Norteño gangs "fall under the guise of the Nuestra Familia, which is a prison street gang in – in California." He described Sureño and Norteño gangs as "archenemies, adversarial." Kilmer was asked whether the conflict between the two gangs dates back "to a prison conflict between the Nuestra Familia, which associates with Norteños, and the Mexican Mafia, which associates with Sureños?" He answered affirmatively. Kilmer explained: "In my opinion, street-level gang members emulate or – or aspire or – or look up to prison gang members. The conflict within the prison system spills out in the street, and we see this every day with Norteño and Sureño violence or Sureño and Norteño violence." Kilmer further testified that gang members are expected to commit acts of violence against members of the opposing gang, and that they get "credit within their gang" for doing so.

As for the victims and witnesses in this case, Kilmer testified that Carlos Aguilar was a Sureño, based on his "prior contacts with the San Jose Police Department and statements he made to other officers after this incident." Additionally, Kilmer stated, Carlos also had a tattoo depicting three dots. Kilmer

had no information indicating gang affiliation for Carlos's friend Martel Alvarez or his three uncles, Jose, Daniel, and Omar Menjivar.

Without defense objection, Kilmer testified to his opinion that defendant is a Norteño, based on a tattoo on his hand reading "XIV" – Roman numeral 14 – and a tattoo on his neck reading "SSSJ," which stands for "South Side San Jose," a Norteño gang. Defense counsel did object when the prosecutor asked Kilmer whether it was common for Norteños in San Jose to assault immigrants who are not gang members and do not speak English.[4] Counsel cited two grounds for his objection: exceeding the scope of the witness's expertise and relevance. The court overruled the objection.

b. Jail Calls

The prosecution also introduced four telephone calls made by defendant from jail following his arrest, both the recordings themselves and transcripts. Some of the statements by defendant during the jail calls referred to the attacks on "two Sureños."

By written *in limine* motion, defense counsel challenged introduction of the jail calls. The court considered defendant's challenges in a hearing conducted outside of the jury's presence. As the court noted, defense counsel objected to introduction of specific portions of the jail calls on the ground that the prejudicial effect of the evidence outweighed its probative value under Evidence Code section 352. Counsel also made some relevance objections. After entertaining argument concerning each of the four recordings, the court overruled the defense objections.

More specifically concerning the statements about Sureños, the prosecutor stated her intent to ask "Detective Kilmer whether or not Jose, Omar, and Daniel

[4] Victim Jose Menjivar apparently is such a person.

were gang members and eliciting through him some information about the victim [Carlos] who is deceased. And given that, it would give this statement context. And it's highly probative." Defense counsel complained that "the reports are basically littered with comments from officers that at least Carlos Aguilar was a Sureño." The court ruled in the prosecutor's favor, saying "I think the probative value outweighs any – any prejudice or any undue consumption of time or the chance of misleading the jury. So I'm going to overrule the objection."

In trial testimony given after this ruling, Kilmer stated that the reference in the jail calls to "two Sureños" was defendant's way of telling fellow Norteños "that he attacked some Sureños and he wants credit for it."

The gang evidence was mentioned in closing arguments, both by the prosecution and by the defense.

2. Admissibility of the Evidence

"In cases *not* involving the gang enhancement," California Supreme Court precedent teaches, "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see *id.* at p. 1044 ["court acted within its discretion in refusing to bifurcate trial of the gang enhancement from trial of the charged offense"]; see also, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905 [not only did gang evidence have "limited probative value, but its admission created a substantial danger of undue prejudice"].)

"Given its highly inflammatory impact, the California Supreme Court has condemned the introduction of such evidence if it is only *tangentially* relevant to the charged offenses." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223 [citing *People v. Cox* (1991) 53 Cal.3d 618, 660, which was disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) "Thus, as general rule, evidence of gang membership and activity is admissible if it is

logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*People v. Albarran*, at p. 223.) "Although evidence of a defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts—such evidence is admissible when relevant to prove identity or motive, if its probative value is not substantially outweighed by its prejudicial effect." (*People v. Carter, supra,* 30 Cal.4th at p. 1194.)

3. Counsel's Performance

Here, as noted above, defense counsel did interpose some written and oral objections to the gang evidence, including objections under Evidence Code section 352. Counsel also requested a limiting jury admonition about the gang evidence. In making these objections and requests, however, counsel did not specifically assert that the evidence was inflammatory or that it represented improper propensity or character evidence.

Nevertheless, to the extent that counsel did not attempt to prevent or limit the gang evidence on appropriate grounds, we find no basis to second-guess his tactical choices. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 384.) Ineffective performance is established only where "there simply could be no satisfactory explanation" for counsel's failure to object. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1211.) Defendant has not demonstrated that circumstance here.

Here, as defense counsel recognized, the gang evidence was relevant on the question of motive. It tended to undercut the prosecution's motive theory for the first attack, which was that defendant beat Carlos to avenge the arrest of defendant's younger brother, Jesse Lopez, who had been arrested while riding in a stolen car with Carlos. As defense counsel said in his closing argument, "Carlos Aguilar is somebody that's supposed to be a – a Sureño gang member. You know,

Jesse Lopez, I guess – it was pointed out may be a Norteño gang member. Well, these guys are hanging out. You know, they're friends." Counsel continued, "there's nothing within – within that situation that would create a motive for Jesse Lopez's brother to come and savagely attack Carlos Aguilar."

In sum, the gang evidence had some relevance on the question of motive, and since it could be used tactically by the defense, counsel may have had good tactical reasons for not objecting more strenuously to its admission. Thus, there is no basis for finding counsel's performance deficient.

4. Prejudice

In any event, this record discloses no prejudice. As explained above, the prosecution presented strong identification evidence, which was the only disputed material issue at trial. On this record, we cannot agree that "but for counsel's failings, the result of the proceeding would have been more favorable to the defendant." (*People v. Hinton*, *supra*, 37 Cal.4th at p. 876.)

DISPOSITION

The judgment is affirmed.

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McAdams, J.

WE CONCUR:

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Mihara, Acting P.J.

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Duffy, J.